

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 11, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KELLI A.,¹

Plaintiff,

vs.

MARTIN O'MALLEY,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:22-cv-03148-RHW

**ORDER ADOPTING REPORT
AND RECOMMENDATION TO
GRANT PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND DENY DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

ECF Nos. 13, 21, 24

Before the Court is the Report and Recommendation issued by Magistrate Judge Alexander C. Ekstrom, ECF No. 24, recommending Plaintiff's Motion for Summary Judgment, ECF No. 13, be granted and Defendant's Motion for Summary Judgment, ECF No. 21, be denied. No objections were filed.

After reviewing the Report and Recommendation, the Court finds the

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Pursuant to Federal Rule of Civil Procedure 25(d), Martin O'Malley, Commissioner of Social Security, is substituted as the named Defendant.

1 Magistrate Judge’s findings are correct. Therefore, the Court adopts the Report
2 and Recommendation with the following comment. Though no objections were
3 filed, the Court has carefully considered whether further proceedings are
4 necessary. Plaintiff’s application has been pending since 2017 and the erroneously
5 rejected opinion of Dr. Birger, if credited as true, would compel a finding of
6 disability. Though this may not be one of those “rare” cases where remand for an
7 award of benefits is warranted because courts do not reweigh the evidence on
8 appeal, this does mark the second time this matter has been remanded for the same
9 legal error. *See* Tr. 128-130 (prior Appeals Council remand for failure to
10 adequately evaluated the medical source evidence and failing to adequately
11 evaluate Plaintiff’s past relevant work). If the ALJ errors a third time, and the
12 record is fully developed, it is highly likely a reviewing Court will be inclined to
13 exercise its discretion to remand for an award of benefits, not for further
14 proceedings once again. *See Lopez v. Astrue*, 497 F. App’x 717, 719 (9th Cir.
15 2012) (“Because this case has been remanded twice before, we see no point in
16 giving the Commissioner a fourth opportunity to determine the claimant's
17 eligibility. We reverse and remand for an award of benefits.”).

18 Accordingly, **IT IS ORDERED:**

19 1. The Report and Recommendation, **ECF No. 24**, is **ADOPTED** in its
20 entirety.

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.

2 The Commissioner's decision is **REVERSED** and this matter is **REMANDED** for
3 further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

4 3. Defendant's Motion for Summary Judgment, **ECF No. 21**, is **DENIED**.

5 4. Upon proper presentation, the Court will consider Plaintiff's application
6 for fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

7 5. The District Court Executive shall update the docket sheet to reflect the
8 substitution of Martin O'Malley as Defendant.

9 The District Court Executive is directed to enter this Order, **ENTER**
10 **JUDGMENT** in favor of Plaintiff, forward copies to counsel and Magistrate Judge
11 Ekstrom, and **CLOSE THE FILE**.

12 DATED April 11, 2024.

13 s/Robert H. Whaley
14 ROBERT H. WHALEY
 Senior United States District Judge